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No. 87-1165

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the district court has jurisdiction over this suit challenging the United States' claim that it holds title to certain land in trust for the benefit of an Indian Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 830 F.2d 139. The opinion of the district court (Pet. App. 12a-26a) is reported at 628 F. Supp. 1018.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987. The petition for a writ of certiorari was filed on January 11, 1988, and was granted on April 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*; the Quiet Title Act, 28 U.S.C. (& Supp. IV) 2409a; and the McCarran Amendment, 43 U.S.C. 666, are reproduced as an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. This case involves a challenge by two public water agencies in California and the States of California and Arizona to orders of the Secretary of the Interior that redetermined the boundaries of the Fort Mojave, Colorado River, and Yuma (Quechan) Indian Reservations. This Court recognized reserved water rights for the three Reservations in *Arizona* v. *California,* 373 U.S. 546, 598-600 (1963) (*Arizona* v. *California I*), in which the Court, in the exercise of its original jurisdiction, allocated the mainstream waters of the lower Colorado River among the States of California, Arizona, and Nevada and adjudicated the rights of the United States to water for a number of federal reservations in the lower Colorado River basin. Questions concerning the boundaries of the three Indian Reservations at issue here have been raised but not resolved in *Arizona* v. *California.* See *Arizona* v. *California,* 460 U.S. 605, 628-641 (1983) (*Arizona* v. *California II*).

In this suit challenging the Secretary's administrative determinations of the boundaries, the parties agreed to litigate first the challenge to the 1974 order of the Secretary pertaining to the Fort Mojave Reservation and a 1978 resurvey of the Reservation's boundary based on the 1974 order. Because the Fort Mojave Reservation therefore was the subject of the district court's decision and the interlocutory appeal, we shall briefly describe the nature of the boundary dispute concerning that Reservation.[1]

The Fort Mojave Reservation originally was established by Executive Order of the President dated March 30, 1870, as a military reservation, which consisted of two parts: the Camp Mojave Military Reservation and the Camp Mojave Hay and Wood Reserve. E.R. 65-66, 72.[2] By Executive Order dated September 19, 1890, both portions of the Reservation were

[1] The boundary disputes concerning the other Reservations are described in *Arizona* v. *California II,* 460 U.S. at 631-633.

[2] "E.R." refers to the excerpts of the district court record that were filed in the court of appeals.

transferred to the Secretary of the Interior for the benefit of the Fort Mojave Indians. E.R. 74. An additional portion was added to the Reservation in 1911. A.R. 45-46;[3] *Arizona* v. *California I,* 373 U.S. at 596 n.100.

At issue here is a dispute concerning the location of the western boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation. The 1870 order that first set aside the Hay and Wood Reserve for military purposes described the boundaries of the Reserve in an internally inconsistent manner. It described the land by courses and distances and with reference to the total amount of acreage (9114 acres) within the Reserve. However, it also referred to two posts marking the western boundary as being "near the left bank of the Colorado River." E.R. 65-66.[4] As explained in the legal opinion on which the Secretary based his 1974 order that petitioners challenge in this case, if the boundaries of the Hay and Wood Reserve are to correspond to the courses and distances and if the Reserve is to comprise the full 9114 acres, the western boundary could not be located at the Colorado River, but instead must be somewhat to the west of the River. Indeed, if the boundary were placed at the location of the River in 1870, the area of the Reserve would be reduced by approximately 3500 acres, or 38%. A.R. 10-11. Nevertheless, in 1928, the Reserve was officially surveyed pursuant to instructions that placed its western boundary at the left bank of the River, and that survey was adopted by the General Land Office in 1931. *Arizona* v. *California II,* 460 U.S. at 631-632; A.R. 8.

2. In *Arizona* v. *California I,* the Court held that the Boulder Canyon Project Act, 43 U.S.C. 617-617t, mandates a scheme for apportioning the mainstream waters of the Colorado River among the States in the Lower Basin and empowers the

[3] "A.R." refers to the administrative record that was compiled in connection with the Secretary's issuance of the 1974 order and is part of the record in the district court.

[4] The legal description actually is contained in a War Department memorandum dated March 12, 1870 (E.R. 65-71), which described a number of military reservations and was approved in the March 30, 1870, Executive Order of the President.

Secretary of the Interior to effectuate that apportionment by making contracts for the delivery of water (373 U.S. at 564-565, 575-582).[5] The two California public water agencies that are petitioners in this case, the Metropolitan Water District (MWD) and the Coachella Valley Water District (Coachella), receive Colorado River water pursuant to contracts with the Secretary made under that authority.

The Court in *Arizona* v. *California I* also adjudicated the reserved rights of the United States to the use of waters of the mainstream of the lower Colorado River for five Indian Reservations and other federal establishments (373 U.S. at 595-601). The reserved water rights for the five Indian Reservations have priority dates of the establishment of the respective Reservations and are calculated on the basis of the quantity of water required to irrigate the "practicably irrigable acreage" within each Reservation (*id.* at 600-601). Under the statutory scheme established by the Boulder Canyon Project Act, the Secretary must satisfy certain prior rights, called "present perfected rights," before furnishing water under contracts entered into pursuant to that Act, such as those with petitioners MWD and Coachella (*id.* at 584; see also *Bryant* v. *Yellen,* 447 U.S. 352, 364-365 (1980)). The reserved rights recognized by the Court in *Arizona* v. *California I* for the Indian Reservations and other federal establishments are "present perfected rights" for these purposes, and they therefore must be satisfied before the Secretary may deliver water under contracts.[6]

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[5] Arizona initiated the proceedings in *Arizona* v. *California* in 1952 by filing a complaint naming the State of California and seven of its public water agencies as defendants. Arizona sought to establish its rights in the Colorado River system and to limit California's annual consumptive use of water from the River. Nevada intervened, seeking a determination of its rights, and Utah and New Mexico were joined as defendants. The United States intervened to assert the water rights of various federal establishments, including the three Indian Reservations that are the subject of the Secretarial orders at issue in this case. See *Arizona* v. *California II,* 460 U.S. at 608-609.

[6] The decree implementing the Court's decision in *Arizona* v. *California I* defines "perfected rights" as (i) rights acquired in accordance with state law and exercised by the actual diversion of a specific quantity of water for

In 1964, the Court entered a decree specifying the shares of mainstream water to which Arizona, California, and Nevada are entitled, as well as the quantity of water to which the United States is entitled for each of the Indian Reservations and other federal establishments (376 U.S. 340 (1964), as amended, 383 U.S. 268 (1966)). The decree mandates, inter alia, that all uses of water within a State, including uses by the United States for Indian Reservations and other federal establishments, must be charged to that State's apportionment. 376 U.S. at 343; see also *Arizona* v. *California I,* 373 U.S. at 601.[7] As a result, for example, reserved water rights for federal establishments in California, including the portion of the Fort Mojave Reservation that is situated in California, have a priority over the contractual rights of petitioners MWD and Coachella that also must be satisfied out of California's allotted share of mainstream water.

3. The controversy concerning the western boundary of the Hay and Wood portion of the Fort Mojave Reservation has surfaced twice in *Arizona* v. *California.* The first occasion was during the proceedings before Special Master Rifkind that preceded the decision in *Arizona* v. *California I.* After receiving evidence on the issue, Special Master Rifkind concluded in his report that the United States was bound by the 1928 survey that drew the boundary of the Hay and Wood Reserve at the Colorado River, thereby excluding the 3500 acres at issue here, and that, in any event, the 1928 survey was the best evidence of the proper location of the boundary.[8] He then relied on that boundary determination in calculating the number of practicably irrigable acres

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definite purposes, and (ii) "water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use" (376 U.S. 340, 341 (1964)). The decree defines "present perfected rights" as "perfected rights * * * existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act" (*id.* at 341).

[7] In 1979, the Court entered a supplemental decree quantifying all the present perfected rights to be satisfied out of the Lower Basin waters of the River (439 U.S. 419).

[8] Report of the Special Master, Dec. 5, 1960, at 283-287, *Arizona* v. *California,* No. 8 (1960 Term); see also *Arizona* v. *California II,* 460 U.S. at 632.

within the Fort Mojave Reservation and the corresponding number of acre-feet of water necessary to satisfy the present perfected right for the Reservation. The Court, however, declined to adopt Special Master Rifkind's recommendation regarding the boundary issue, explaining (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

Nevertheless, in its 1964 decree, the Court used Special Master Rifkind's calculations, which excluded all practicably irrigable acres within the 3500-acre area, in calculating the amount of water reserved for the Reservation (376 U.S. at 345; see *Arizona* v. *California II,* 460 U.S. at 630). However, the Court included a proviso in the decree that contemplated a future resolution of the boundary dispute (*ibid.*):

> [T]he quantities [of water] fixed * * * shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

See also 439 U.S. 419, 421, 426 (1979) (supplemental decree).

4. In 1974, the Secretary of the Interior issued an administrative order concluding that the 1928 survey upon which Special Master Rifkind had relied in his recommendation to the Court in *Arizona* v. *California I* was erroneous and that the Executive Order establishing the Hay and Wood Reserve actually was intended to place the western boundary of the Reserve to the west of the Colorado River.[9] The Secretary therefore con-

[9] The Secretary's order took the form of a memorandum from the Secretary to the Director of the Bureau of Land Management (BLM), which incorporated a legal opinion of the Associate Solicitor for Indian Affairs that explained the internal inconsistency in the original description of the Reserve and the basis for concluding that the 3500 acres in question were intended to be within the Reservation as originally established. E.R. 75-78; A.R. 9-40. On the basis of his thorough examination of events leading to the creation of the Reserve in 1870 and thereafter, the Associate Solicitor concluded, inter alia, that the identification of the western boundary of the Reserve at the Colorado River probably resulted from the erroneous location of the River on maps that were then available to the responsible office of the Army in San Francisco in 1870 (A.R. 12-13), and that Lt. Wheeler, whose survey notes formed the basis for the Reserve, did survey the entire 9114-acre area (*id.* at 18-24).

concluded that the 3500 additional acres enclosed by the relocated boundary are part of the Fort Mojave Reservation. Accordingly, the Secretary declared null and void the 1928 survey and ordered that the boundary be resurveyed in accordance with his determination. E.R. 75-76. The plat of the resurvey was filed on November 6, 1978. Pet. App. 3a & n.2, 13a-14a, 16a; *Arizona* v. *California II,* 460 U.S. at 631-632. The United States had retained legal title to most of the 3500 acres from 1928 to 1974, and they were then being administered as non-Indian public lands, under BLM jurisdiction. However, since the 1974 Secretarial order and the 1978 resurvey, those lands have been administered by the Bureau of Indian Affairs as lands held by the United States for the benefit of the Fort Mojave Tribe.

5. a. After the official plat of the resurvey of the Hay and Wood Reserve was filed in November 1978, the United States filed a motion in this Court in December 1978 requesting the Court to amend the decree in *Arizona* v. *California* to increase the quantity of water to which the United States is entitled for the Fort Mojave Reservation. The United States argued that the Secretary's 1974 order and 1978 resurvey had "finally determined" the boundary of the Reservation within the meaning of the proviso to the 1964 decree of this Court, quoted at page 6, *supra,* and that the United States, on behalf of the Tribe, is entitled to the additional water necessary to irrigate the "practicably irrigable acreage" within the 3500-acre area. The Court referred the United States' motion to amend the decree to the new Special Master, Elbert P. Tuttle. 439 U.S. 419, 436-437 (1979). In a preliminary report issued on August 28, 1979, Special Master Tuttle agreed with the United States that the Secretary's 1974 order had "finally determined" the boundary of the Fort Mojave Reservation and that the decree should be

amended to increase the quantity of water to which the United States is entitled under the present perfected right for the Reservation (*Arizona* v. *California II,* 460 U.S. at 612-613). The Court denied the States' motion for leave to file exceptions to this preliminary report. 444 U.S. 1009 (1980).

On July 21, 1981, before Special Master Tuttle issued his final report, petitioners MWD and Coachella filed the instant suit against the United States and the Secretary of the Interior in the United States District Court for the Southern District of California. E.R. 166.[10] Invoking the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, as the basis for judicial review, petitioners requested the court to set aside the Secretary's 1974 order and to make a "judicial determination and declaration as to the boundaries of the Fort Mojave Indian Reservation"—specifically, to declare that the western boundary is located along the "left bank of the Colorado River in its last natural course" (Second Amended Complaint at 17, 22; E.R. 17, 22), thereby excluding the disputed 3500 acres from the Reservation lands that the United States holds in trust for the Tribe.

On February 22, 1982, Special Master Tuttle filed his final report, concluding that the Secretary's order had "finally determined" the boundary for the purpose of amending the decree implementing *Arizona* v. *California I. Arizona* v. *California II,* 460 U.S. at 613. On April 29, 1982, the district court stayed proceedings in the instant suit pending this Court's ruling on the exceptions to the Master's report. Pet. App. 5a.

b. In *Arizona* v. *California II,* the Court rejected Special Master Tuttle's recommendation that the Court amend the decree to increase the quantity of water allocated to the Fort Mojave Reservation on the basis of the Secretary's 1974 order and the 1978 resurvey. The Court stated that when it rendered the decision in *Arizona* v. *California I* and entered the implementing decree, it

[10] The States of California and Arizona were subsequently joined as nominal defendants in the instant suit, after they declined to intervene (E.R. 11-12), although they aligned themselves with the plaintiffs (see Pet. Br. 2) and are petitioners herein. The Fort Mojave Tribe, the Colorado River Tribe, and the Fort Yuma (Quechan) Tribe intervened as defendants. Pet. App. 3a.

> in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court then expressed its preference that the boundary dispute be settled outside of the original proceedings in *Arizona* v. *California.* The Court referred specifically to the instant case, which was then pending (but had been stayed) in the district court (*id.* at 638 & n.27). At the same time, the Court recognized that there might be jurisdictional or other obstacles that would render it impossible for the district court to resolve the boundary issue in this case (*id.* at 638 (footnotes omitted)):

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights.

See also 460 U.S. at 657-658 n.10 (Brennan, J., dissenting).

c. The proceedings in the instant case recommenced after the Court rendered its decision in *Arizona* v. *California II.* As petitioners note (Pet. Br. 11-12), on June 17, 1983, the United States withdrew most of the objections that it had raised in the

motion to dismiss to which this Court referred in *Arizona* v. *California II*.

Thereafter, in a decision rendered on February 25, 1986, the district court set aside the Secretary's 1974 order under the APA (Pet. App. 12a-26a). The court first held that the 1974 order and 1978 resurvey exceeded the Secretary's statutory authority within the meaning of the APA, 5 U.S.C. 706(2)(C). The court relied on 43 U.S.C. 772, which permits the Secretary to resurvey public lands but provides that "no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." The court rejected the contention by the United States and the Tribes that the quoted proviso protects only those persons who claim an interest in the land itself, and concluded instead that petitioner MWD must be regarded as a "claimant" because its contractual water rights would be affected if the United States is entitled to a reserved water right to irrigate land in the area included in the Reservation by the resurvey. Pet. App. 19a-20a. The court also held that the Secretary's 1974 order was issued without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. 706(2)(D), because it adversely affected the water agencies' property rights under their water contracts with the Secretary of the Interior without affording them an opportunity to be heard (Pet. App. 20a-24a). Having set aside the Secretary's order, the court announced its intention to make a de novo determination of the proper location of the disputed boundary, rather than remanding the matter to the Secretary, and it therefore set the case for further proceedings (*ibid.*).

6. The district court certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals granted leave to appeal (E.R. 162-164). In considering the issues to be raised on appeal, we re-examined the question of the district court's jurisdiction in light of two court of appeals decisions that had been rendered since the United States withdrew its jurisdictional objections in the district court. See *Fadem* v. *United States*, 791 F.2d 1381 (9th Cir. 1986) (holding that a

challenge to a boundary survey under 43 U.S.C. 772 may be brought only under the Quiet Title Act, 28 U.S.C. 2409a); and *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (holding that the "Indian lands" exception to the Quiet Title Act, 28 U.S.C. 2409a(a), bars a suit under the APA challenging the Secretary's right to hold land in trust for Indians), cert. denied, 475 U.S. 1011 (1986). Based on those decisions and their elaboration upon the teachings of *Block* v. *North Dakota*, 461 U.S. 273 (1983), and *United States* v. *Mottaz*, 476 U.S. 834 (1986), regarding the "Indian lands" exception in the Quiet Title Act (QTA) and the exclusiveness of the remedy afforded by the QTA, the United States renewed on appeal its argument that the APA does not confer authority on the district court to entertain the petitioner water agencies' challenge to the Secretary's boundary determination.

The court of appeals held that the district court is without jurisdiction, and it remanded the case with directions to dismiss the complaint without reaching the merits of the boundary dispute (Pet. App. 1a-11a). The court of appeals first rejected petitioners' contention that the United States had waived its sovereign immunity to the instant suit in the district court by intervening in the original proceedings in this Court in *Arizona* v. *California* for purposes of establishing the water rights of federal establishments (Pet. App. 7a-8a). The court observed that although the boundary issue might affect those water rights, "[a]n application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries" (*id.* at 8a (footnote omitted)).

The court of appeals next held that the APA does not furnish a basis for the district court to review the Secretary's boundary determination and declare the proper location of the boundary, because the APA "does not waive immunity as to any claims which are expressly or impliedly forbidden by 'any other statute

that grants consent to suit' " (Pet. App. 9a, quoting 5 U.S.C. 702(2)). The court ruled that the QTA is such a statute, because it grants consent to certain suits challenging the United States' title to real property but expressly withholds consent to suits challenging the United States' title to "trust or restricted Indian lands" (28 U.S.C. (Supp. IV) 2409a(a)). Pet. App. 9a. The court rejected petitioners' contention that the QTA does not foreclose this suit because petitioners do not assert an interest in the 3500 acres that were included in the Reservation by the resurvey of the boundary; the court reasoned that the "Indian lands" exception in the QTA remains relevant in this setting because "the effect of a successful challenge would be to quiet title in others than the Tribe" (*ibid.*) and because "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). The court of appeals also rejected petitioners' contention, based on *Spaeth* v. *Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), that even if this suit is governed by the QTA, the United States should not be permitted to invoke the exception in that Act for "trust or restricted Indian lands" unless it makes a threshold showing that there is a substantial likelihood that the land has that status. The Court explained that " '[t]he immunity of the government applies whether the government is right or wrong' " (Pet. App. 11a, quoting *Wildman* v. *United States,* 827 F.2d 1306, 1309 (9th Cir. 1987)).

Finally, the court of appeals held that the necessary consent to this suit is not supplied by the McCarran Amendment, 43 U.S.C. 666, in which Congress granted consent to join the United States as a defendant in a suit to adjudicate rights to the use of the waters of a river system or other source. Relying on this Court's decision in *Dugan* v. *Rank,* 372 U.S. 609, 617-618 (1963), the court explained that the McCarran Amendment authorizes "only suits to adjudicate the rights of all claimants on a stream," and it concluded that "[t]his suit is not such a general adjudication" (Pet. App. 11a).

SUMMARY OF ARGUMENT

I. The United States is immune from suit in the absence of an express waiver of that immunity by Congress. In this case, petitioners principally rely on the waiver of sovereign immunity in the 1976 amendments to the Administrative Procedure Act, 5 U.S.C. 702. However, that provision by its terms does not "confer[ ] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" (5 U.S.C. 702(2)). The Quiet Title Act (QTA), 28 U.S.C. (& Supp. IV) 2409a, is such a statute. The QTA grants consent to name the United States as a party in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. (Supp. IV) 2409a(a). However, the QTA contains express exceptions that withhold the waiver of sovereign immunity for suits involving "water rights" or "Indian lands." *Ibid.* Each of those exceptions is applicable here. Since the QTA therefore "expressly forbids the relief that is sought" (5 U.S.C. 702(2)), the APA's waiver of sovereign immunity does not authorize the district court to grant petitioners relief.

The "water rights" exception in the QTA applies here because petitioners claim no interest in the land itself and their sole purpose in bringing this suit is to defeat the United States' claim to reserved water rights. In fact, petitioners acknowledge that this "is clearly an action 'involving or relating to water rights' " (Br. 44). Petitioners cannot avoid the preclusive effect of the "water rights" exception by splitting their cause of action and seeking adjudication of only one of its elements: the reserved status of the land for which the United States claims water rights. The preclusive effect of the "water rights" exception in the QTA is reinforced by the McCarran Amendment, 43 U.S.C. 666, which does grant consent to name the United States as a defendant in a suit to adjudicate water rights, but only in the context of a general adjudication of all of the rights in a river system or other source. See *Dugan* v. *Rank,* 372 U.S. 609, 618 (1963). This suit, by contrast, concerns only one aspect of the water rights of only one party (the United States). Accordingly, for purposes of

the APA's waiver of sovereign immunity in 5 U.S.C. 702, the McCarran Amendment, like the QTA, is another statute that grants consent to suit but forbids the partial water rights adjudication that petitioners seek. Congress expressly preserved the special and limited statutory regime for the adjudication of water rights under the McCarran Amendment when it enacted the QTA in 1972, and the legislative history of the APA's waiver of sovereign immunity in 5 U.S.C. 702 makes clear that it likewise was not intended to disturb that regime.

This suit is also barred by the "Indian lands" exception in the QTA. That exception withholds consent to suits "by third parties challenging the United States' title to land held in trust for Indians," and it therefore applies whenever "the United States claims an interest in real property based on that property's status as trust or restricted Indian land" (*United States* v. *Mottaz,* 476 U.S. 834, 842, 846 (1986)). Petitioners do not dispute that the 3500 acres in question are "held in trust for Indians" and that the United States claims an interest in the land on that basis. Moreover, this suit conflicts with the underlying purposes of the Indian lands exception of preventing third parties from disrupting the solemn obligations of the United States to the Indian and subjecting the Indians' land to suit without their consent. The Court in *Block* v. *North Dakota* 461 U.S. 273, 285 (1983), stressed that plaintiffs must not be permitted to circumvent the Indian lands exception and other limitations in the QTA by resorting to other avenues of relief, including the APA. Petitioners contend, based on *Spaeth* v. *Secretary of Interior,* 757 F.2d 937 (8th Cir. 1985), that the United States was required to satisfy the courts below that there is a "substantial possibility" that the 3500 acres are in fact Indian trust lands before it could invoke the Indian lands exception. However, it would be inappropriate to require a court to delve deeply into the merits in order to determine the sovereign's amenability to suit. *Spaeth* did not identify any basis in the QTA for this novel precondition to the invocation of sovereign immunity, and the QTA and the decision in *Mottaz* make clear that the application of the Indian lands exception turns on the interest the United States claims. Nor does this case present the special equitable circumstances that underlay the *Spaeth* ruling. At most, the United States could be required to show that its assertion that the disputed property is Indian land is "substantial" in the sense of being non-frivolous, a standard that is unquestionably satisfied in this case.

Petitioners err in contending that the limitations in the QTA are irrelevant because they do not seek to divest the United States of property or to quiet title in themselves. Petitioners plainly *do* seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) all reserved water rights for the 3500-acre tract. And even with respect to the land itself, the effect of a judgment in petitioners' favor would be to quiet title to the land itself in someone other than the Tribe, and thereby allow third parties to disrupt the United States' relationship with the Indians to the same extent as if petitioners did claim an interest in the land. Moreover, 28 U.S.C. (Supp. IV) 2409a(d) makes clear, and petitioners concede, that relief may be awarded under the QTA only to a person who claims an interest in the disputed property. Because the QTA therefore "impliedly forbids" the granting of relief to parties who do not claim an interest in the property, the waiver of sovereign immunity in 5 U.S.C. 702(2) is inapplicable.

II. The United States did not waive its immunity to this suit in district court by intervening in the original proceedings in this Court in *Arizona* v. *California,* 373 U.S. 546 (1963). Only Congress may waive the immunity of the United States to suit, and such a waiver must be unequivocally expressed. There is no indication in the QTA or in the statutes governing original cases in this Court that Congress intended that the United States would waive its immunity to other suits by participating in such cases.

ARGUMENT

THE DISTRICT COURT DOES NOT HAVE AUTHORITY TO ADJUDICATE THE LOCATION OF THE RESERVATION BOUNDARIES

Our submission in this case concerns only the amenability of the United States and the Secretary of the Interior to suit in the

district court to resolve the boundary issue that underlies the United States' claim of water rights for the disputed 3500-acre portion of the Fort Mojave Indian Reservation. In this respect, the case presents questions of general importance under the Administrative Procedure Act, the Quiet Title Act, and the McCarran Amendment.

Insofar as the underlying water-rights controversy is concerned, however, the consequences of our submission are modest. We do not ask the Court to validate the Secretary's boundary determination on the merits, and we do not suggest that petitioners have no right to challenge that determination in other judicial proceedings. We contend only that petitioners may not do so in *this* suit. A ruling to that effect by this Court would not have a substantially adverse effect on petitioners. The Court made clear in *Arizona* v. *California II* that the Secretary's orders correcting the boundaries of the three Reservations cannot result in an increase in the reserved water rights for the Reservations unless petitioners are first given an opportunity to challenge those orders. 460 U.S. at 636. Because petitioners are barred by sovereign immunity from challenging the Secretary's orders in the instant case, they of course must be afforded a suitable opportunity to do so in another forum—*e.g.*, in this Court, following a renewed motion by the United States (or by petitioners themselves) to amend the decree in *Arizona* v. *California* in a manner that finally determines the boundary issue, or, if appropriate, in other proceedings initiated by the United States for purposes of resolving that issue—before this Court's decree in *Arizona* v. *California* could be amended to recognize additional water rights for the Reservations that could adversely affect the contractual rights of petitioners MWD and Coachella.

The United States has no interest in delaying a final resolution of the boundaries of the three Reservations, and, indeed, the United States urged this Court to determine the boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation in *Arizona* v. *California I* and urged the Court to give effect to the Secretary's determination of that boundary in *Arizona* v.

California II. Accordingly, if, as we urge, the Court affirms the court of appeals' judgment ordering dismissal of this case, the United States will promptly consider what further steps should be taken to bring about an expeditious resolution of these issues.

I. PETITIONERS MAY NOT OBTAIN A JUDICIAL DETERMINATION OF THE RESERVATION BOUNDARIES IN A SUIT UNDER THE ADMINISTRATIVE PROCEDURE ACT

In this suit, petitioners seek to set aside the Secretary's determination that 3500 acres had been erroneously excluded from the Fort Mojave Indian Reservation. In addition, petitioners request a "declaration that the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the bed of the Colorado River" (Second Amended Complaint at 21-22; E.R. 21-22). The relief petitioners request would divest the United States of title to the 3500 acres in its capacity as trustee for the Fort Mojave Tribe and would divest the Tribe of its equitable interest in that land. Title would revert to the United States in fee simple, and the United States would hold the 3500 acres as general public lands, administered by the Bureau of Land Management. Accordingly, as the court of appeals observed, the "effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a). Moreover, the effect of a judgment in petitioners' favor on the reservation status of the 3500 acres of land would be to divest the United States of its legal title to (and the Tribe of its equitable interest in) the water rights that were reserved for the irrigable portion of that land when it was included as part of the Fort Mojave Reservation.

As this Court observed in another case involving disputed title to real property in which the United States claims an interest, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). See also

United States v. *Mottaz*, 476 U.S. 834, 851 (1986) (citations omitted) (" '[a] waiver of sovereign immunity "cannot be lightly implied but must be unequivocally expressed" ' "). The petitioner water agencies therefore cannot bring this action against the United States and the Secretary of the Interior to resolve questions concerning either the nature of the United States' title to the 3500 acres or the United States' ownership of reserved water rights for that area, unless Congress has unequivocally waived the immunity of the United States and consented to such an action.

In this case, petitioners principally rely (Pet. Br. 25-36) on a provision of the Administrative Procedure Act, 5 U.S.C. 702, as the requisite waiver of sovereign immunity. This reliance is misplaced. As this Court held in *Block* and *Mottaz*, Congress intended the Quiet Title Act (QTA), 28 U.S.C. (& Supp. IV) 2409a, to be the exclusive basis for suits seeking an adjudication of disputes concerning title to real property in which the United States claims an interest. Petitioners' suit is foreclosed under the QTA because it falls within the express exceptions to the waiver of sovereign immunity under that Act for suits concerning "water rights" and for suits concerning "trust or restricted Indian lands." Moreover, as petitioners concede (Br. 25-26), the QTA does not in any event waive the immunity of the United States to suits brought by parties, such as the petitioner water agencies, who do not even claim an interest in the real property that is the subject of the suit. Because the relief petitioners seek is forbidden by the QTA, the waiver of sovereign immunity in 5 U.S.C. 702 does not authorize the district court to grant that relief in a suit under the APA.

A. The Waiver of Sovereign Immunity Under the APA Does Not Confer Authority To Grant Relief If Another Statute That Grants Consent to Suit Expressly or Impliedly Forbids the Relief Which is Sought

In the 1976 amendments to the APA, Congress enacted a broad waiver of federal sovereign immunity to suits against the United States and its officers seeking judicial review of agency

action and requesting relief other than money damages. Pub. L. No. 94-574, § 1, 90 Stat. 2721, codified at 5 U.S.C. 702. See S. Rep. 94-996, 94th Cong., 2d Sess. 3-12 (1976); H.R. Rep. 94-1656, 94th Cong., 2d Sess. 2-13 (1976); *Bowen* v. *Massachusetts*, No. 87-712 (June 29, 1988), slip op. 11-12; *id.* at 1-2 (Scalia, J., dissenting).[11] In so doing, however, Congress was careful to preserve the limitations on the consent to suit under other statutes in which Congress had more narrowly waived the sovereign immunity of the United States for certain classes of cases. Specifically, the last sentence of 5 U.S.C. 702 provides, in subsection (2), that "[n]othing herein"—*i.e.*, nothing in the APA's general waiver of sovereign immunity—" * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." As the House and Senate reports explained: "[T]he amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. * * * If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained [under the APA] only if Congress has not intended that provision for relief to be

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[11] Prior to 1976, 5 U.S.C. (1970 ed.) 702 provided:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

In the 1976 amendments, Congress added the following sentence to Section 702:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

As the committee reports cited in the text make clear, the purpose of this sentence was to eliminate the defense of sovereign immunity in civil actions governed by the APA. The next sentence of the amended 5 U.S.C. 702 permits the United States to be named as a defendant (while requiring the judgment to identify the officer against whom the injunction runs), and the final sentence contains two limitations on the waiver of sovereign immunity, 5 U.S.C. 702(1) and (2), that are discussed at pages 19-22 and note 12, *infra*.

exclusive." H.R. Rep. 94-1656, *supra,* at 12-13; S. Rep. 94-996, *supra,* at 11, 12.[12]

In enacting the waiver provision of the APA in 1976, with its explicit limitation, Congress adopted the 1969 proposal of the Administrative Conference of the United States. See H.R. Rep. 94-1656, *supra,* at 4, 12, 23-24, 26-28; S. Rep. 94-996, *supra,* at 3, 12, 22-23, 25-27. In a memorandum supporting its proposal, the Administrative Conference specifically explained the reason for this limitation on the waiver of sovereign immunity:

> The Committee's recommendation is phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes * * * in which Congress has conditionally consented to suit. While this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal [see 5 U.S.C. 702(1), discussed in note 12, *supra*], which include the designation by Congress of an exclusive remedy or method of review, clause (2) of the final sentence of part (1) of the recommendation is intended to prevent any question on this matter from arising.

Sovereign Immunity: Hearing on S.3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 138-139 (1970) [hereinafter *1970 APA Hearing*]. Congress thus unmistakably expressed its determination that plaintiffs not be permitted to rely on the general waiver of sovereign immunity under the APA to circumvent limitations on the waiver of sovereign immunity in other statutes that address particular subject matters.[13]

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[12] The last sentence of 5 U.S.C. 702, as amended in 1976, also provides that nothing in the waiver of sovereign immunity "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground" (5 U.S.C. 702(1)). This provision, inter alia, preserves the bar to judicial review under the APA itself, where other "statutes preclude judicial review" (5 U.S.C. 701(a)(1)).

[13] The principal examples, cited in the legislative history, of other statutes in which Congress had consented to suit but had expressly or impliedly forbidden injunctive or declaratory relief were the Court of Claims Act, 28 U.S.C. 1491, and the Tucker Act, 28 U.S.C. 1346(a)(2); the legislative history makes clear Congress's understanding that the creation of a damage remedy under those statutes for contract claims "impliedly forbids" a court from ordering specific performance of the contract or other injunctive or declaratory relief. H.R. Rep. 94-1656, *supra*, at 12-13; S. Rep. 94-996, *supra*, at 12. The committee reports also state (*ibid.*) that 5 U.S.C. 702(2) does not affect limitations on specific relief derived from the provision for recovery of damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, as well as limitations on specific relief in tax claims (see 26 U.S.C. 7421) and patent infringement cases. The Administrative Conference's memorandum pointed out that there may well be circumstances under which 5 U.S.C. 702(2) would render specific relief unavailable even though damages or other relief was not available under another statute that grants consent to suit in a general category of cases because of exceptions to the waiver under the other statute—*e.g.*, where a damages action under the FTCA is foreclosed by one of the exceptions in 28 U.S.C. 2680, or where a damages remedy is unavailable under the Tucker Act because the claim is quasi-contractual or restitutionary in nature. See *1970 APA Hearing* 139, 140-141.

The intention of Congress to give full effect to limitations on review under other statutory waivers of sovereign immunity is further underscored by the fact that Congress accepted the recommendation of the Department of Justice that the APA amendment should retain the language in the Administrative Conference's proposal that withholds authority to grant relief under the APA where another statute that grants consent "impliedly" forbids relief as well as where it "expressly" does so.[14] As then-Assistant Attorney General Scalia explained in his letter urging that approach, waiver statutes enacted prior to 1976 were passed against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular

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[14] The version of the APA bill as originally introduced and considered by the Senate would have narrowed the scope of 5 U.S.C. 702(2) to withhold authority to grant relief only if the other statute granted consent to suit for money damages; that version of the bill also deleted the phrase "expressly or impliedly" in the Administrative Conference proposal. S. Rep. 94-996, *supra*, at 12, 26. In response to the Justice Department's urging, the Senate Committee amended the provision to conform to the Administrative Conference's proposal (*id.* at 12), and it passed the House and Senate in that form.

waiver statute. Assistant Attorney General Scalia further explained that because then-existing statutes that waived the sovereign immunity of the United States in particular categories of cases were enacted against the backdrop of sovereign immunity, "in most if not all cases where statutory remedies already exist, these remedies will be exclusive; that is no distortion, but simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." H.R. Rep. 94-1656, *supra*, at 28; S. Rep. 94-996, *supra*, at 27.

As we shall now explain, petitioners' attempt to invoke the waiver of sovereign immunity in 5 U.S.C. 702(2) in seeking an adjudication of disputed issues concerning the United States' interests in real property is foreclosed by Congress's decision to preserve limitations on review under other statutes that comprehensively address the waiver of sovereign immunity with respect to a particular subject matter.

B. The Waiver of Sovereign Immunity In 5 U.S.C. 702 Is Inapplicable In This Case Because the Quiet Title Act Is A Statute That Grants Consent to Suit But Expressly or Impliedly Forbids the Relief Petitioners Seek

The Quiet Title Act, which was enacted only four years prior to the 1976 amendments to 5 U.S.C. 702, is precisely the sort of pre-existing waiver statute to which Congress referred when it limited the scope of the APA's waiver of sovereign immunity: The QTA is an "other statute that grants consent to suit" but "expressly or impliedly forbids the relief which is sought" in the instant case. Moreover, this Court has twice held that " 'Congress intended the QTA to provide the *exclusive* means by which adverse claimants could challenge the United States' title to real property' " (*Mottaz*, 476 U.S. at 841 (emphasis added), quoting *Block*, 461 U.S. at 286; see also 476 U.S. at 846). It follows that petitioners cannot avoid the limitations in the QTA by bringing an action under the APA. Indeed, Congress explicitly acknowledged when it amended 5 U.S.C. 702 to address the sovereign immunity issue on a general basis in 1976 that the

QTA already addressed the question of sovereign immunity in the specific context of disputed title to real property in which the United States claim an interest.[15]

Accordingly, the Court in *Block* specifically rejected the contention that a plaintiff may invoke the waiver of sovereign immunity in the 1976 amendments to the APA to avoid the limitations on the waiver of sovereign immunity under the QTA (461 U.S. at 286 n.22). The Court concluded that the QTA is an "other statute" that grants consent to suit within the meaning of 5 U.S.C. 702(2) and that if a suit is untimely under the QTA's 12-year statute of limitations (see 28 U.S.C. 2409a(f)), "the QTA expressly 'forbids the relief' which would be sought under § 702" (461 U.S. at 286 n.22). See also *ibid.*, quoting H.R. Rep. 94-1656, *supra*, at 13 ("§ 702 provides no authority to grant

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[15] The House and Senate Reports state, in identical language:

> Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable—and intended by Congress—that a court would uphold a claim of sovereign immunity, involved disputed title to real property. The results in these cases were so obviously unjust that in 1972 with the enactment of legislation also considered and reported by this committee, Congress enacted legislation to permit actions to quiet title to be brought against the United States. 28 U.S.C. sections 1346(f), 1402(d), 2409(a).

H.R. Rep. 94-1656, *supra*, at 8 (footnotes omitted); S. Rep. 94-996, *supra*, at 7-8 (footnotes omitted). The citation of 28 U.S.C. 2409a is significant, because subsection (a) of that section contains not only the QTA's waiver of sovereign immunity but also the exceptions to that waiver for "water rights" and "Indian lands," both of which are applicable here. See pages 24-25, *infra*.

When the APA's waiver of sovereign immunity was first considered by Congress in 1970, prior to enactment of the QTA, cases in which the plaintiff challenges the United States' title to real property were viewed as presenting one part of the broader question whether the sovereign immunity of the United States should be waived as a general matter. However, quiet title cases were viewed as an especially sympathetic category for such a waiver, and both the Department of Justice and the Committee on Judicial Review of the Administrative Conference, in a memorandum prepared by Roger Cramton, suggested special legislation on that discrete subject. *1970 APA Hearing* 66, 69, 117, 126-128, 252. Congress followed that course by enacting the QTA in 1972, at a time when the Department of Justice had not yet lent its support to the general waiver of sovereign immunity in the APA.

relief 'when Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy' ").

The APA holding in *Block* applies equally here, because this suit too is within the general subject matter addressed by the QTA but likewise is foreclosed by specific limitations under that Act. In the QTA, Congress waived the sovereign immunity of the United States to certain suits to adjudicate disputed title to real property in which the United States claims an interest, but it carefully limited that waiver in a number of respects. 28 U.S.C. (Supp. IV) 2409a.[16] The basic waiver of immunity in the QTA provides (28 U.S.C. (Supp. IV) 2409a(a)):

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666). [17]

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[16] When Congress enacted the QTA in 1972, it conferred jurisdiction on the district courts to entertain suits under the QTA. Pub. L. No. 92-562, § 1, 86 Stat. 1176, codified at 28 U.S.C. 1346(f) ("The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."). In *California* v. *Arizona*, 440 U.S. 59 (1979), the Court held that the jurisdiction conferred on the district courts by 28 U.S.C. 1346(f) is "exclusive" of the state courts, but not this Court; as a result, the waiver of sovereign immunity under the QTA permits the United States to be named as a defendant in a quiet title action that is otherwise within the original jurisdiction of this Court under 28 U.S.C. 1251 and Article III, Section 2 of the Constitution.

[17] Section 1346 of Title 28 is the general provision conferring jurisdiction where the United States is a defendant, including Tucker Act and FTCA cases; 28 U.S.C. 1347 and 2410 permit suits to partition property in which the United States has an interest and the adjudication of claims concerning property in which the United States has a security interest; 28 U.S.C. 1491 governs the

Under this provision, the waiver of sovereign immunity is withheld here, because the instant suit is barred by the express exceptions for suits involving "water rights" and "Indian lands." Moreover, other provisions of the QTA make clear that Congress did not permit third parties who do not even claim an interest in the real property in which the United States claims an interest to bring about an adjudication of a dispute concerning title to that property.

1. *The Exception for Suits Involving "Water Rights"*

a. The relief petitioners MWD and Coachella seek in this case—a judicial decree setting aside the Secretary's determination of the western boundary of the Hay and Wood portion of the Fort Mojave Reservation—would divest the United States of its title to 3500 acres of land in its capacity as trustee for the Fort Mojave Tribe and would divest the Tribe of its equitable interest in that land. But petitioners do not seek review of the Secretary's order for purposes of establishing the legal or equitable ownership of the land for its own sake, because they claim no interest in the land. Petitioners are interested in the boundary issue only because it has a direct bearing on their challenge to the United States' claim of a right to water from the lower Colorado River: if the 3500 acres of land are part of the Fort Mojave Reservation, then, under *Arizona* v. *California I,* the United States has a reserved right to sufficient water to irrigate all land within the 3500-acre area that is found to be practicably irrigable. Thus, a challenge to the Secretary's determination that the land was reserved for the benefit of the Indians is merely one element of petitioners' true cause of action, which is a challenge to the United States' ownership of reserved water rights. It is only because of the possible effect of the United States' reserved water rights on MWD's and Coachella's contractual water rights that they could even have Article III standing to bring this suit,

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jurisdiction of the Claims Court; and 43 U.S.C. 666, popularly known as the McCarran Amendment, grants the consent of Congress to name the United States as a defendant in a general adjudication of all of the rights to the use of water in a river system or other source (see pages 26-27, *infra*).

and petitioners in fact acknowledge (Br. 46) that they brought this suit challenging the Secretary's boundary determinations "*solely* to determine water rights" (emphasis in original). This case therefore falls within the express exception in the QTA that preserves the sovereign immunity of the United States to civil actions seeking an adjudication of "water rights" claimed by the United States. 28 U.S.C. (Supp. IV) 2409a(a).

As petitioners point out (Pet. 44), the "water rights" exception was incorporated into the QTA from the draft bill submitted by the Department of Justice. In urging adoption of the Justice Department bill, the Attorney General explained that the waiver of sovereign immunity under the QTA "does not apply to civil actions * * * involving or relating to water rights." H.R. Rep. 92-1559, 92d Cong., 2d Sess. 10 (1972); see also S. Rep. 92-575, 92d Cong., 1st Sess. 6 (1971). And petitioners in fact expressly *concede* (Br. 44-45) that "the District Court suit below is clearly an action 'involving or relating to water rights' inasmuch as the determination of an Indian reservation boundary is the essential first step in the adjudication of the 'practicably irrigable acreage' within the boundaries of an Indian reservation which is entitled to a *Winters* right." [18] Petitioners further concede (Br. 45) that they seek, in essence, "a *partial* adjudication of the essential elements of the water rights of the three reservations—the boundary portions" (emphasis in original). Contrary to petitioners' contention, however, they cannot avoid the preclusive effect of the "water rights" exception to the QTA's waiver of sovereign immunity by splitting their cause of action and seeking an adjudication of only one of its elements: the reserved status of the land for which the United States claims it has reserved water rights. The preclusion of the whole necessarily includes a preclusion of its constituent parts. Because the QTA therefore "expressly forbids" the relief petitioners seek, that relief is not authorized by the APA's waiver of sovereign immunity under 5 U.S.C. 702.

b. Although Congress has withheld its consent under the QTA to suits seeking an adjudication of water rights claimed by

[18] See *Winters* v. *United States*, 207 U.S. 564 (1908).

the United States, Congress elsewhere has consented to such suits in certain limited circumstances. In Section 208 of the Act of July 10, 1952, ch. 651, 66 Stat. 560, codified at 43 U.S.C. 666, popularly known as the McCarran Amendment, Congress gave its consent "to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source * * *." However, as this Court held in *Dugan* v. *Rank*, 372 U.S. 609 (1963), the McCarran Amendment grants Congress's consent to join the United States as a defendant only in "a case involving a *general* adjudication of 'all of the rights of various owners on a given stream' " (*id.* at 618 (quoting S. Rep. 755, 82d Cong., 1st Sess. 9 (1951) (emphasis in original)). Accord, *United States* v. *District Court for Eagle County*, 401 U.S. 520, 525 (1971); see also *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 819 (1976) ("comprehensive" adjudication); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983) ("comprehensive state adjudications"). As the court of appeals held, "[t]his suit is not such a general adjudication" (Pet. App. 11a). In the first place, petitioners do not request the district court actually to adjudicate *any* party's water rights as such; they merely seek adjudication of one element of a reserved water-rights claim. Moreover, petitioners seek an adjudication of the rights of only *one* water user on the lower Colorado (the United States), and only as regards some of that party's water rights (those reserved for the disputed portions of the Indian Reservations). Thus, like the plaintiffs in *Dugan* v. *Rank*, the petitioner water agencies brought this action to determine water rights solely between themselves and the United States, and only incompletely at that. This therefore is not a general adjudication of all of the rights to water from the Colorado River, and it follows that the McCarran Amendment does not furnish the necessary consent to suit.

By waiving the United States' immunity to suits challenging the United States' water rights only in general stream adjudications, the McCarran Amendment withholds consent to other suits challenging the United States' water rights. Accordingly, for purposes of the limitation on the APA's general waiver of

sovereign immunity in 5 U.S.C. 702(2), the McCarran Amendment, like the QTA, is an "other statute that grants consent to suit" in a general class of cases concerning a category of interests in real property, but the McCarran Amendment "impliedly forbids" relief insofar as the petitioner water agencies seek only a "partial" adjudication of water rights (see Pet. Br. 45). Thus, the McCarran Amendment reinforces our conclusion in point a, *supra,* based on the "water rights" exception in the QTA, that the APA's general waiver of sovereign immunity does not authorize the court to grant relief in this case.

That interpretation is supported by the legislative history of 5 U.S.C. 702(2) as well. The Administrative Conference of the United States, in its memorandum supporting its recommendation that Congress amend the APA to waive sovereign immunity to certain suits challenging agency action, specifically discussed the Court's holding in *Dugan* v. *Rank* that the United States had not consented to that suit under the McCarran Amendment (*1970 APA Hearing* 113). Significantly, moreover, the Administrative Conference's memorandum stated that the proposed waiver of sovereign immunity would not extend to suits concerning water rights. See *1970 APA Hearing* 139-140 (emphasis added) ("Special statutory remedies having the same character [as the Court of Claims Act and the Tucker Act], such as those dealing with Indian claims, patent infringement, *water rights,* and the like retain the same preclusive effect on other remedies that they have now"). The committee reports on the 1976 amendments to the APA also refer to the sovereign immunity ruling in *Dugan* v. *Rank* (H.R. Rep. 94-1656, *supra,* at 6 (quoting Letter from Assistant Attorney General Scalia)); see also S. Rep. 94-996, *supra,* at 5 (same). Although the committee reports do not specifically refer to the McCarran Amendment aspect of *Dugan* v. *Rank,* they express no disagreement with the conclusion of the Administrative Conference, which proposed the exception in 5 U.S.C. 702(2), that the APA's waiver of sovereign immunity would not affect limitations on "[s]pecial statutory remedies" dealing with "water rights"; as petitioners concede (Br. 44), the McCarran Amendment was the most prominent (whether or not the only) example of such a statute.

It also is significant that Congress did not disturb the special and limited statutory regime for the adjudication of water rights under the McCarran Amendment when it enacted the QTA: Section 2409a(a) expressly provides that the QTA does not "apply to or affect actions which may be or could have been brought under * * * section 208 of the Act of July 10, 1952 (43 U.S.C. 666)." When Congress enacted the QTA in 1972, the Court had already held in *Dugan* v. *Rank* and reaffirmed in *Eagle County* that the waiver of sovereign immunity in the McCarran Amendment applies only to general stream adjudications. Congress should be presumed to understand the state of existing law when it legislates. *Bowen* v. *Massachusetts,* slip op. 15; *Cannon* v. *University of Chicago,* 441 U.S. 677, 696-697 (1979). The express exception in the QTA for suits involving "water rights" claimed by the United States therefore reflects Congress's determination even prior to the enactment of the APA's waiver of sovereign immunity in 1976 that the adjudication of water rights in a suit brought against the United States should continue to be permitted only in the context of a general stream adjudication. This conclusion is reinforced by the testimony of the Justice Department witness concerning the reference to the McCarran Amendment in the QTA:

> There is existing authority to sue the United States for the adjudication of water rights. This is under 43 U.S.C. 666. So, not wishing to disturb the existing law, as to that grant of consent, there was included in the bill an additional exception as to suits relating to property with respect to which the United States claims water rights.

Suits to Adjudicate Disputed Titles to Land in Which the United States Claims an Interest: Hearing on S. 216, et al., Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 92th Cong., 2d Sess. 60 (1972) [hereinafter *House QTA Hearing*]. See also *id.* at 52, 55; S. Rep. 92-575, *supra,* at 6; H.R. Rep. 92-1559, *supra,* at 3 & n.1, 6, 10.[19]

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[19] Petitioners cite (Br. 46) *Colorado River Water Conservation District* and *San Carlos Apache Tribe* for the proposition that "the McCarran Amend-

ment did not make general stream adjudications the exclusive vehicle for resolving water rights claims"; from this premise, petitioners argue that the McCarran Amendment does not foreclose them from bringing an action under the APA seeking an adjudication of the United States' water rights. Petitioners cannot make this leap. *Colorado River Water Conservation District* and *San Carlos Apache Tribe* concerned the jurisdiction of the district court to adjudicate the United States' reserved water rights in suits brought by the United States or the Indian Tribes for whose benefit the water rights were reserved. Neither decision supports the proposition that a third party may bring an action against the United States seeking an adjudication of water rights it holds in trust for an Indian tribe. Such a suit must overcome the sovereign immunity of the United States, which is the subject addressed by the McCarran Amendment.

In addition, petitioners err in relying (Br. 46) on *South Delta Water Agency* v. *United States Dep't of Interior*, 767 F.2d 531, 540-541 (9th Cir. 1985). There, the Ninth Circuit held that sovereign immunity did not bar an action to require the Secretary of the Interior to operate certain facilities of the Central Valley Project in California in accordance with state law and in a manner that did not interfere with the rights of other water users. The plaintiffs in *South Delta* did not challenge the *United States'* title to land or water rights, and that suit (unlike this one) therefore was not affected by either the consent to suit in the QTA or the corresponding limitations on that consent (see 767 F.2d at 541-543). Similarly, in *Joint Board of Control of the Flathead Mission & Jocko Irrigation Districts* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), also cited by petitioners (Br. 46), the court disavowed any purpose to adjudicate water rights (832 F.2d at 1130). Rather, that case involved a challenge to the Secretary's operation of a project to protect Indian fishery interests.

For the same reason, petitioners' reliance (Br. 45) on *Dugan* v. *Rank* is misplaced. That case did not involve an adjudication of water rights claimed by the United States; to the contrary, as we have explained (see page 28, *supra*), the Court specifically held that the McCarran Amendment did not permit such an adjudication (372 U.S. at 617-619). *Dugan* v. *Rank* instead involved a suit seeking to prevent the federal defendants from interfering with the *plaintiffs'* water rights. Application of the "water rights" exception in the QTA turns on the interest claimed by the United States, not the plaintiff. *House QTA Hearing* 51-52, 55, 59-60; compare *Mottaz*, 476 U.S. at 842-843. Petitioners cite no other case to support their assertion (Br. 45) that, prior to the QTA, a party would have been permitted to resort to an officer's suit to obtain an adjudication of the United States' water rights. In any event, because the QTA is now the exclusive basis for adjudicating disputes concerning the United States' interests in real property (except for the McCarran Amendment and the other statutory provisions referred to in the QTA itself), and because the QTA does not permit suits concerning the United States' water rights, it is irrelevant whether such a suit could have been brought prior to enactment of the QTA in 1972. Compare *Block*, 461 U.S. at 284-286.

c. Against this background, there is no merit to petitioners' contention (Br. 43-47) that the decision below frustrates congressional objectives concerning the orderly adjudication of Indian water rights. As this Court has held, the congressional policy, as embodied in the McCarran Amendment, is to facilitate comprehensive rather than piecemeal adjudication of rights to the use of water in river systems and other sources in which the United States claims water rights. See *Colorado River Water Conservation District*, 424 U.S. at 819-820; *San Carlos Apache Tribe*, 463 U.S. at 569-570. The "water rights" exception in the QTA furthers that policy. This congressional scheme would be substantially undermined if parties were permitted to institute an adjudication of the United States' water rights in a manner that would be piecemeal not only in the sense that not all water rights would be determined, but also in the sense that not even all the elements of one water right claim would be adjudicated.[20] Contrary to petitioners' contention, therefore, the decision below is fully consistent with congressional policy concerning the adjudication of water rights.

2. *The Exception for "Trust or Restricted Indian Lands"*

This suit is equally barred even if its fundamental character as a partial water rights adjudication is ignored and the suit is regarded as nothing more than a challenge to the boundary of the land that is part of the Fort Mojave Reservation. That is so because this case also falls within the express exception in the QTA for suits involving "trust or restricted Indian lands."

a. As this Court has explained, the Indian lands exception operates "to retain the United States' immunity from suit by

[20] Under our submission, the absence of authority of a court to award relief under 5 U.S.C. 702 in a case involving an adjudication of the United States' "water rights" is not limited to water rights reserved for the benefit of Indians. Accordingly, and contrary to petitioners' assertion (Br. 46-47), petitioners likewise could not invoke the APA's waiver of sovereign immunity to challenge a determination by the Secretary concerning the boundary of a wildlife reservation, national forest, or other federal reservation where, as here, the purpose of that challenge is "*solely* to determine water rights" (*ibid.* (emphasis in original)).

third parties challenging the United States' title to land held in trust for Indians" (*Mottaz,* 476 U.S. at 842). Petitioners do not dispute that, as a result of the Secretary's determination that the 3500 acres in question are part of the Fort Mojave Reservation as originally established, those lands are now "held in trust for Indians" by the United States.

To be sure, petitioners contend in this suit that the land should *not* be held in trust for Indians and that it instead is part of the public domain, to be administered by BLM.[21] But that of course is the very issue to be decided on the merits if this suit is permitted to proceed. At this stage, the case presents only the threshold issue of whether the "Indian lands" exception to the QTA expressly forbids the relief MWD and Coachella seek, and thereby precludes this suit under the APA. That threshold issue turns on the nature of the interest the United States asserts in the property. This is apparent from the very text of the QTA, which, in 28 U.S.C. (Supp. IV) 2409a(a), authorizes suits "to adjudicate a disputed title to real property in which the United States *claims an interest*" (emphasis added).[22] Indeed, this Court adopted that interpretation in *Mottaz*, stating that "when the United States *claims* an interest in real property based on that property's status as trust or restricted Indian land, the Quiet Title Act does not waive the government's immunity" (*Mottaz,*

[21] More precisely, petitioners contend that the land should not be held in trust for Indians on the basis of the Secretary's 1974 determination, which found that the disputed land is part of the Reservation as set aside for the Indians in 1890, because any water rights reserved for use on that land would then have a priority date of 1890. Petitioners state (Br. 34) that they "would not and probably could not" challenge a policy decision to add the 3500 acres to the Fort Mojave Reservation at the present time. Such an addition of the lands to the Reservation with a current effective date of course would render any water rights reserved in connection with that addition junior to the contractual rights of MWD and Coachella.

[22] The fact that the existence of jurisdiction under the QTA turns on the interest the United States claims is textually reconfirmed in 28 U.S.C. (Supp. IV) 2409a(e), which provides that "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff," and if the disclaimer is confirmed by court decree, the jurisdiction of the district court under the QTA shall cease.

476 U.S. at 843 (footnote omitted; emphasis added)). As we have noted, petitioners do not, and cannot, dispute that the United States claims an interest in the real property at issue here on the basis of its status as trust land. It follows that the relief petitioners seek in the instant suit – a judicial order setting aside the Secretary's determination that the 3500 acres in question are Indian lands and a judicial declaration of the western boundary of the Hay and Wood Reserve that excludes the 3500 acres from the Fort Mojave Reservation – is expressly forbidden by the "Indian lands" exception to the QTA and therefore is not authorized by the APA's waiver of sovereign immunity in 5 U.S.C. 702.

This conclusion also is supported by the purposes underlying the "Indian lands" exception. When Congress enacted the QTA, it retained the United States' immunity to suits involving Indian lands (*Minnesota* v. *United States,* 305 U.S. 382, 385-387 (1939)) in order to prevent third parties from disrupting commitments made by the United States to Indian people. *Block* v. *North Dakota,* 461 U.S. at 283; *Mottaz,* 476 U.S. at 842-843 & n.6; Pet. App. 9a-10a. This purpose is explained in the letter from the Solicitor of the Interior urging the adoption of this provision, which was part of the draft bill submitted by the Justice Department:

> [T]he Justice proposal specifically excludes land held in trust for Indians and Indian restricted lands. The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. 92-1559, *supra,* at 13; S. Rep. 92-575, *supra,* at 4.[23]

[23] The Justice Department's proposals (see S. Rep. 92-575, *supra,* at 7-8) were largely adopted by Congress, and they formed the basis for the QTA as

See also *Dispute of Titles on Public Lands: Hearing on S. 216, S. 579, and S. 721 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 2, 19 (1971) [hereinafter *Senate QTA Hearing*]; *House QTA Hearing 22, 43, 47, 52, 55-56.*[24] Compare *County of Oneida* v. *Oneida Indian Nation,* 470 U.S 226, 233-236, 244 (1985). Similarly, the Court explained in *Mottaz* that Congress enacted the Indian lands exception because it was concerned that "[a] unilateral waiver of the Federal Government's immunity would subject these lands to suit without the Indians' consent" (476 U.S. at 843 n.6). It would be inconsistent with these congressional purposes to permit petitioners' suit to proceed under the APA, because it would enable third parties to disrupt the solemn commitments made by the United States to the Fort Mojave Tribe in the 1890 Executive Order, as now construed by the United States, and it would subject the 3500 acres in question to suit without the Indians' consent.

The importance of preventing circumvention of the limitations on the waiver of sovereign immunity under the QTA was stressed in *Block* v. *North Dakota,* in which the Court held that the QTA precludes a party from bringing a suit against the federal officer responsible for administering property claimed by the United States in order to resolve a dispute concerning the United States' title to that property. See 461 U.S. at 281-286. If it were otherwise, the Court stressed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted" (461 U.S. at 284-285). In particular, the Court pointed out that if it "were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception

finally enacted (*Block*, 461 U.S. at 283-284). The "Indian lands" exception was enacted in the same form in which it was proposed by the Department of Justice.

[24] The transcript of the *House QTA Hearing* was released by the House Judiciary Committee in 1978. Although that transcript therefore is not printed and bound with the transcripts of other hearings conducted by the Committee during the 92d Congress, it is available on microfiche through the Congressional Information Service, Serial No. H521-37.

to the QTA would be rendered nugatory" (*id.* at 285). The same would be true here if petitioners were permitted, by suing the Secretary of the Interior, to bring about an adjudication of the nature of the federal government's title. And as the Court further held in *Block* (461 U.S. at 286 n.22), the 1976 amendments to 5 U.S.C. 702 do not permit a party to avoid the limitations under the QTA by bringing a suit under the APA.

Prior to its decision in the instant case, the Ninth Circuit had held that, under *Block*, the QTA is the exclusive avenue for resolution of all boundary disputes with the federal government, because the location of the boundary delineates the government's claim of an interest in the property enclosed. *Fadem* v. *United States,* 791 F.2d 1381, 1382-1383 (1986). That holding is fully supported by the legislative history of the QTA, which demonstrates that Congress expected that "[p]erhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property." H.R. Rep. 92-1559, *supra*, at 6; see also *id.* at 9 (letter from the Attorney General); S. Rep. 92-575, *supra*, at 5 (same). In fact, the impetus for enactment of the QTA was a boundary dispute between the United States and private landowners that resulted from a resurvey of lands along the Snake River in Idaho that was undertaken pursuant to the Secretary's resurvey authority under 43 U.S.C. 772 (see *Senate QTA Hearing* 38; *House QTA Hearing* 26), the same statute under which the resurvey of the Hay and Wood Reserve was made.[25] See generally *California* v. *Arizona,* 440 U.S. at 67 n.7; *Senate QTA Hearing* 7-18, 33-55; *House QTA Hearing* 2-42.

The Ninth Circuit's decision in the instant case simply applies the foregoing principles to a dispute over the location of a boundary that encloses lands held in trust for Indians: Because the QTA expressly bars suits concerning title to Indian trust lands, it necessarily bars this suit concerning the location of a boun-

[25] The resurvey in the instant case also was authorized by 25 U.S.C. 176, which grants the Secretary authority to survey Indian lands in conformity with rules and regulations under which other public lands are surveyed (*e.g.*, 43 U.S.C. 772).

dary that encloses such lands. See also *Carlson* v. *United States*, 556 F.2d 489, 491-492 (Ct. Cl. 1977); *Carlson* v. *Tulalip Tribes*, 510 F.2d 1337, 1339 (9th Cir. 1975); *Newman* v. *United States*, 504 F. Supp. 1176, 1178-1180 (D. Ariz. 1981). The fact that the Indian lands exception would operate in this manner and bar suits concerning the boundaries of trust or restricted Indian lands was specifically brought to the attention of Congress during the hearings.[26]

b. Petitioners contend (Br. 36-43) that even if the limitations in the QTA are applicable here, the Ninth Circuit misapplied the "Indian lands" exception in the circumstances of this case. Petitioners rely on *Spaeth* v. *Secretary of Interior*, 757 F.2d 937 (8th Cir. 1985), where the court held that in order to invoke the Indian lands exception, the United States must make a threshold showing that there is a "substantial possibility" that the lands in question are in fact trust or restricted Indian lands (*id.* at 943). Petitioners contend that the United States has not demonstrated such a "substantial possibility" here and that MWD's and Coachella's suit under the APA therefore should be permitted to proceed in order conclusively to resolve the title question. That argument is unavailing for several reasons.

i. First, there is no reason to resolve this issue here, because the Indian lands exception in the QTA is not the only source of the bar to the district court's authority to grant petitioners relief. As we have explained, the "water rights" exception in the QTA also expressly forbids this suit (and the McCarran Amendment impliedly does so), and as we shall explain (see pages 40-45, *infra*), the QTA also forbids the granting of relief unless the

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[26] See *Senate QTA Hearing* 58 (remarks of a representative of Title Insurance and Trust Co.):

> In connection with the administration bill, paragraph A of the proposed section 2409A provides that the section does not apply to trust or restricted Indian lands. It is not clear to us why these lands were omitted from the effect of the bill because the boundaries of restricted Indian lands are just as much of a problem as are other public lands or formerly public lands.

See also *House QTA Hearing*, 47, ~~quoted~~ Note at page 27, *infra*.

plaintiff claims an interest in the property that is the subject of the suit. Accordingly, even if petitioners were correct that the *Spaeth* test should apply and is not satisfied here, this suit must be dismissed.

ii. Second, the Eighth Circuit in *Spaeth* did not identify any basis in the QTA for its conclusion that the United States must demonstrate a "substantial possibility" that the lands are trust or restricted Indian lands. The Eighth Circuit merely cited *Newman* v. *United States*, 504 F. Supp. 1176, 1179 (D. Ariz. 1981) (see 757 F.2d at 943), which does not in any event survive the Ninth Circuit's subsequent decision in *Wildman* v. *United States*, 827 F.2d 1306 (1987), discussed below. Nor did the court in *Newman* identify any basis in the QTA for its threshold test. The district court there simply stated that the United States' claim must be "substantial," relying on several decisions of this Court that discussed the merits of the government's claim in the course of holding the respective suits barred by sovereign immunity. See 504 F. Supp. at 1179, citing *Louisiana* v. *Garfield*, 211 U.S. 70, 77-78 (1908); *New Mexico* v. *Lane*, 243 U.S. 52 (1917); *Morrison* v. *Work*, 266 U.S. 481, 485 (1925). However, to the extent that this Court's discussion of the issues raised by the government's claim in the cases cited in *Newman* suggests the need for any threshold inquiry at all, it suggests only that a court might determine whether the government's claim of an interest in the property is more than a bare assertion—*i.e.*, that it is substantiated by some supporting rationale—and, perhaps, that the claim is non-frivolous. It is not clear, in fact, that the district court in *Newman* intended anything more by its use of the word "substantial." Compare *Hagans* v. *Lavine*, 415 U.S. 528, 537-538 (1974) (a claim is "insubstantial," and therefore will not support federal jurisdiction, if it is frivolous or completely foreclosed by prior decisions); see also *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681-682 n.12 (1986) (same). In *Spaeth*, however, the Eighth Circuit appeared to suggest a more rigorous standard, under which the United States must demonstrate a substantial possibility of succeeding on the merits of the claim that the property is trust or restricted Indian lands. At least to the extent the Eighth Circuit intended to require more than a showing that the claim is non-

frivolous, that approach finds no support in the QTA in particular or in principles of sovereign immunity in general.

As we have shown, this Court made clear in *Mottaz,* which was decided after *Spaeth,* that "[w]hen the United States *claims* an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity" (476 U.S. at 843 (emphasis added; footnote omitted)). As a result, the protection afforded to the United States and the Tribe by the Indian lands exception turns on the nature of the United States' claim, not on whether a court finds a "substantial possibility" that the United States would ultimately prevail on that claim if the case were to proceed to the merits.[27] This interpretation also is apparent from the language of the QTA waiver itself, which consents to suit (with the specified exceptions) with respect to property in which the United States "claims an interest." 28 U.S.C. (Supp. IV) 2409a(a). See also 28 U.S.C. (Supp. IV) 2409a(e).

The mischief of the rule petitioners urge is demonstrated by *Spaeth* itself, in which the Eighth Circuit ordered the district court to conduct an elaborate inquiry into numerous issues of law and fact bearing on the merits of the claim, in order to determine whether the suit was barred by the Indian lands exception. See 757 F.2d at 943-945. However, as the Ninth Circuit observed in *Wildman*, "[t]he immunity of the government applies whether the government is right or wrong," and "[t]he very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position" (827 F.2d at 1309). As the court of appeals held in this case, the United States is not

[27] A representative of the California Land Title Association pointed out during the hearings that the "Indian lands" exception would bar an inquiry into whether particular property in fact is Indian land (*House QTA Hearing* 47):

> [T]he bill is presently structured to exclude its application to trust or restricted Indian lands and if, for policy reasons, it is desired to continue this exclusion you will hear no objection from us – other than a mild protest that many situations revolve around questions of whether or not some area is, in fact, Indian lands and that in fairness these questions should also be allowed to be settled – if the bill is fair in one area, it is also fair elsewhere.

" 'to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians' " (Pet. App. 10a-11a (quoting *Wildman*, 827 F.2d at 1309)).[28]

The claim that the lands in the resurveyed area of the Hay and Wood Reserve are "trust or restricted Indian lands" is plainly "colorable" and non-frivolous. The 1870 order describing the Hay and Wood Reserve states that it contains the full 9114 acres the Secretary now recognizes and specifies the courses and distances upon which the Secretary relied in his 1974 order. On this basis, the district court expressly found that there are "genuine issues" of material fact and a "lively dispute" regarding the boundaries and the acreage intended to be included in the Reservation when it was established (Pet. App. 16a, 25a). Moreover, the Secretary of the Interior made a formal determination, based on an exhaustive analysis of numerous documents, that the land in question is held in trust for the benefit of an Indian Tribe; in *Spaeth,* there was no such formal determination that the lands in question were held in trust for the benefit of Indians (see 757 F.2d at 942-946). These circumstances are more than sufficient not only to render the claim in the instant case "colorable," but also to give rise to a "substantial possibility" (under a broad reading of *Spaeth*) that the 3500 acres are in fact Indian trust lands.

iii. Finally, in *Spaeth,* the Eighth Circuit acknowledged that its analysis of the jurisdictional issue was "affected by the extremely unusual facts" of the case (757 F.2d at 945): *i.e.,* that the hardship of the immunity rule bore heavily on the non-Indian plaintiffs, because they were in possession of the property in question and recent developments created a sudden and sharp change in the prior understanding of the governing legal principles upon which the plaintiffs had relied (*id.* at 945-946). Here, by contrast, petitioners are not in possession of and claim

[28] We understand the word "colorable" in this passage to mean non-frivolous. Compare *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) (opinion of Stevens, J.); *id.* at 712-714 (White, J., dissenting).

no interest whatever in the 3500 acres, and the Secretary's boundary determination creates no immediate hardship for them—especially since no reserved water right will be recognized for the lands in question unless and until this Court amends its decree in *Arizona* v. *California,* and petitioners concededly must be afforded an opportunity to contest the Secretary's boundary determination in some forum before such an amendment will take place. Thus, the practical and equitable considerations that underlay the Eighth Circuit's decision in *Spaeth* furnish no basis for fashioning a novel prerequisite for invoking the Indian lands exception in the circumstances of this case.

3. *The Limitation of Relief to Parties Claiming an Interest in the Property*

Petitioners also argue (Br. 25-32) that the QTA's preservation of immunity to suits challenging the United States' title to "water rights" and "Indian lands" does not foreclose this action under the APA because petitioners do not themselves claim title to the 3500 acres in question or seek to divest the United States of title. Instead, petitioners argue, they merely seek to have the 3500-acre tract transferred from one category of federal lands (those held in trust for Indians) to another (non-Indian public lands). This effort to avoid the limitations under the QTA is unavailing.

As an initial matter, petitioners clearly *do* seek to divest the United States of its legal title to (and the Tribe of its equitable interest in) a species of real property—the reserved water rights the United States claims for the practicably irrigable acreage within the redetermined boundary. Moreover, even with respect to the land alone, petitioners seek to have the district court set aside the Secretary's determination that the 3500 acres constitute part of the Fort Mojave Indian Reservation as it was originally established in 1890. If the district court entered such an order, the nature of the United States' title would change, because it would no longer own those 3500 acres in trust for the benefit of the Fort Mojave Tribe and the Tribe would lose all interest in the land. To be sure, the lands then would have the status of

public lands managed by BLM, and, as such, would be owned in fee simple by the United States. But the happenstance in this case that the 3500 acres, having lost their character as Indian lands, would remain in federal ownership—of an entirely different character—hardly supports petitioners' argument for avoiding the QTA's bar to suits that challenge the status of Indian lands in the first place. The general waiver of sovereign immunity under the QTA applies to any civil action "to adjudicate a disputed title to real property in which the United States claims an interest" (28 U.S.C. (Supp. IV) 2409a(a)). This case presents such a question of "disputed title"—namely, whether the United States' title is in fee simple absolute or is instead held for the benefit of the Fort Mojave Tribe. In short, this suit seeks to change fundamentally the character of the United States' ownership of the land and to sever completely the Tribe's connection to it.[29]

It also is irrelevant for present purposes that petitioners do not assert an interest in the 3500 acres that are the subject of this

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[29] Petitioners in effect seek to assert an interest of the United States in claiming fee ownership of the 3500 acres, in derogation of the Tribe's beneficial interest. There is no reason to believe that Congress intended to permit third parties to invoke the jurisdiction of the courts in order to advance the government's interests in this manner.

The only authority petitioners cite for the proposition that the QTA is inapplicable where the plaintiff does not seek to divest the United States of title is *Pueblo of Taos* v. *Andrus*, 475 F. Supp. 359 (D.D.C. 1979). See Pet. Br. 32, 35. In that case, the Pueblo challenged the government's determination of a boundary between the Pueblo's land and Forest Service land, contending that the disputed area should be regarded as Indian trust land rather than Forest Service land. The district court, believing that the suit would be barred by the Indian lands exception to the QTA if the QTA applied, concluded that the suit was not governed by the QTA because it did not actually seek to divest the United States of title. 475 F. Supp. at 365. However, under this Court's subsequent decision in *Mottaz* (476 U.S. at 842-843), the *Pueblo of Taos* suit was not barred by the Indian lands exception to the QTA, because the United States did not claim title to the disputed land as Indian trust lands. The impetus for the rationale of *Pueblo of Taos* therefore no longer obtains. Moreover, the decision in *Pueblo of Taos* was rendered without the benefit of this Court's subsequent holdings in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title.

suit. As the court of appeals explained, although petitioners "may not be seeking to quiet title to the land in [themselves,] * * * [t]he effect of a successful challenge would be to quiet title in others than the Tribe" (Pet. App. 9a). As a result, "[t]o allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them" (*id.* at 10a). That is precisely the consequence that Congress sought to avoid by including in the QTA the bar to suits challenging the trust status of land that the United States claims on behalf of Indians. And it therefore is, in turn, precisely the consequence that Congress sought to avoid by providing in 5 U.S.C. 702(2) that nothing in the APA's waiver of sovereign immunity "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[30]

Moreover, the fact that petitioners claim no interest in the disputed property invokes yet another limitation on the waiver

[30] Contrary to petitioners' contention (Br. 32-33), nothing in the decision below affects the authority of a court in a criminal prosecution or habeas corpus action to consider the question of the political boundaries of a reservation for purposes of determining the criminal jurisdiction of the federal, state or tribal government. Questions of sovereign immunity do not arise in a criminal prosecution, because the government is the plaintiff, not the defendant, and because the defendant must in any event be permitted to contest the jurisdiction of the court to entertain the prosecution. Nor would the ruling on the question of the political boundaries of an Indian reservation in a criminal prosecution (at least one brought by a state or tribe) bind the United States in a subsequent civil action concerning title to land within the reservation. For these reasons, *Solem* v. *Bartlett*, 465 U.S. 463 (1984), cited by petitioners (Br. 33), is inapposite. There, in determining whether a state court had criminal jurisdiction, the Court considered whether Congress, by statute, had diminished the political boundaries of an Indian reservation; the Court did not address questions of title, and the crime in that case in fact took place on non-Indian land within the reservation. In *Navajo Tribe* v. *New Mexico*, 809 F.2d 1455 (10th Cir. 1987), also cited by petitioners (Br. 32), the court held that the QTA is the exclusive avenue for challenging the United States' title to land (*id.* at 1468-1469); in the passage quoted by petitioners, the court stated that an adjudication of boundaries is conceptually distinct from an adjudication of title because boundary questions may affect political jurisdiction (*id.* at 1475). Here, by contrast, only the question of title is involved.

of sovereign immunity under the QTA. As petitioners concede (Br. 26, 27-29), Congress permitted challenges to the United States' claim of title to real property to be brought under the QTA only by parties who themselves claim an interest in the same property. See *Kinscherff* v. *United States*, 586 F.2d 159 (10th Cir. 1978); *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. 465, 470-472 (D.D.C. 1978); *Landow* v. *Carmen*, 555 F. Supp. 195, 197 (D. Md. 1983); *Middlefork Ranch, Inc.* v. *Butz*, 393 F. Supp. 624 (D. Idaho 1975); cf. *Prater* v. *United States*, 618 F.2d 263 (5th Cir. 1980). This limitation is evident from the requirement that the complaint in a QTA action "shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property" (28 U.S.C. (Supp. IV) 2409a(d)). Petitioners contend, however, that because this limitation forecloses their suit under the QTA, they should be permitted to challenge the United States' title in a suit under the APA. Petitioners draw the wrong lesson from the foreclosure of review under the QTA.

The purpose of the QTA is to subject the United States' claim of title to adjudication by a court where there is a party who [illegible] an adverse claim to the same property and who therefore may suffer hardship as a result of his inability to remove a cloud on his title to that property. See H.R. Rep. 94-1656, *supra*, at 8, and S. Rep. 94-996, *supra*, at 7-8, both quoted at note 15, *supra*. Without such a limitation, the United States would be exposed to numerous lawsuits by various third persons who might wish to bring about the resolution of a controversy concerning the United States' claim of title but who have no competing claim to the same property. Such suits do not present the potential for hardship or concrete adversity regarding a particular parcel that would warrant subjecting the Executive Branch, the courts, and third parties (such as the respondent Tribes in this case) to the burdens of suit—especially where, as here, the parties who *do* have a direct stake in the question of title to the land (the United States and the Tribe) agree on its proper resolution. This conclusion is especially warranted in the context of a challenge to a boundary survey, because the QTA and APA

were enacted against the background of the established rule that third parties who claim no interest in the land may not bring an equitable action to challenge the Secretary's survey of lands while title remains in the United States, because the survey affects only the federal government's own internal administration of the land. *Lane* v. *Darlington,* 249 U.S. 331, 333-334 (1919); *Cragin* v. *Powell,* 128 U.S. 691, 698-700 (1888). For these reasons, relief is not available to petitioners under the APA's waiver of sovereign immunity in 5 U.S.C. 702 because the QTA is an "other statute that grants consent to suit" but "impliedly forbids" relief to a party who does not claim an interest in the property in which the United States also claims an interest.

As the Eleventh Circuit concluded in *Florida Dep't of Business Regulation* v. *United States Department of Interior*, 768 F.2d 1248 (1985), cert. denied, 475 U.S. 1011 (1986), it would be particularly inappropriate to allow a party who claims no interest in the land to challenge the Secretary's boundary determination and the nature of the United States' title where, as here, such a suit would be barred by an explicit exception in the QTA if it were brought by a party who did claim an interest in the land. In the *Florida* case, the State and several of its subdivisions sued the Secretary of the Interior under the APA challenging the Secretary's decision to take a certain parcel of land in trust for the Seminole Tribe under 25 U.S.C. 465. The plaintiffs did not assert any property interest in the land and did not seek to quiet title to the land in themselves (768 F.2d at 1254). Rather, they objected to the decision to take the land in trust because the Seminole Tribe used the trust land to sell tax-free cigarettes and operate bingo games. *Id.* at 1250-1251. In holding that the waiver of sovereign immunity in 5 U.S.C. 702 did not authorize the district court to grant relief because such relief is impliedly forbidden by the QTA, the Eleventh Circuit explained (768 F.2d at 1254-1255 (footnotes omitted)):

> Appellants quite forcefully contend that this is not a suit to quiet title, because they do not seek to have title to the land quieted in them, nor do they seek recognition of any property interest in the land. Although technically the suit in

> the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes. Here, the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

This reasoning applies equally here.[31]

II. THE UNITED STATES DID NOT WAIVE ITS IMMUNITY TO THIS SUIT IN DISTRICT COURT BY INTERVENING IN *ARIZONA* V. *CALIFORNIA* TO ESTABLISH THE EXISTENCE OF RESERVED WATER RIGHTS IN THE UNITED STATES FOR THE BENEFIT OF THE TRIBE

We have explained in point I that the APA's waiver of sovereign immunity does not authorize the district court to grant petitioners relief on the boundary issue in this case because Congress, in enacting the QTA and the McCarran Amendment, has forbidden the district court from granting that relief in a suit brought against the United States. Petitioners seek to avoid this statutory bar by arguing (Br. 18-24) that the United States waived its sovereign immunity to this suit in district court when it intervened in the original proceedings in this Court in *Arizona* v. *California.* This novel contention is

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[31] But see *City of Sault Ste. Marie* v. *Andrus*, 458 F. Supp. at 471-472.

without merit. When the Court in *Arizona* v. *California II* referred to this suit as a possible vehicle for the final determination of the boundary dispute, the Court acknowledged that the United States had moved to dismiss the complaint on the basis of sovereign immunity; and the Court contemplated that the sovereign immunity issue would be litigated in the ordinary course of trial and appellate proceedings. 460 U.S. at 638. The Court in no way suggested that the United States' immunity to this suit had *already* been waived, notwithstanding the existence of statutory provisions that retain the United States' immunity to suit and bar the district court from granting relief, by virtue of the United States' participation in *Arizona* v. *California*.

Moreover, petitioners candidly admit (Br. 19) that they have found no case to support their novel theory of waiver. This Court's decision in *United States* v. *The Thekla*, 266 U.S. 328, 339-340 (1924), and the lower court decisions cited by petitioners (Br. 19) all involved limited circumstances in which the United States may be susceptible to a counterclaim in the *same* suit, where that is deemed necessary to enable the court to resolve fairly a single overall controversy.[32] Nothing in those decisions or their rationale suggests that the United States' filing of or intervention in a suit in one court waives its immunity to a separate suit in a different court. As this Court recognized in *Block*, prior to enactment of the QTA, persons asserting title to land claimed by the United States could bring about a definitive

[32] See *United States* v. *Martin*, 267 F.2d 764 (10th Cir. 1959); *United States* v. *Taunah*, 730 F.2d 1360 (10th Cir. 1984). In *Jones* v. *Watts*, 142 F.2d 575 (5th Cir. 1944), the court held that although a party could assert a counterclaim against the United States in a suit brought by the United States, it could *not* seek the identical relief in a separate lawsuit. See *Fidelity & Casualty Co.* v. *Reserve Insurance Co.*, 596 F.2d 914, 916-918 (9th Cir. 1979).

Petitioners' citation (Br. 23) of *Minnesota* v. *United States*, 305 U.S. 382 (1939), also is inapposite. There, the Court held that when a case is removed from state court to federal court, the federal court does not have jurisdiction over the case if the state court lacked jurisdiction, even if the federal court would have had jurisdiction if the suit had been filed there in the first instance (*id.* at 388-389). This result has since been overruled by statute. Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637, 28 U.S.C. (Supp. IV) 1441(e).

judicial resolution of the title dispute only by inducing the United States to file a quiet title action against them. See 461 U.S. at 280.[33] Hence, the United States had the prerogative to choose the judicial forum, if any, to which it would voluntarily submit the resolution of the dispute, subject of course to applicable statutory rules of jurisdiction and venue. Cf. *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-515 (1940). When the QTA was enacted, Congress necessarily retained that prerogative for the United States with respect to those disputes concerning title to real property for which the QTA did not waive the sovereign immunity of the United States.

In this case, the United States chose to submit the resolution of the dispute concerning its reserved water rights for the Fort Mojave Reservation and other federal establishments to this Court by intervening as a plaintiff in the original proceedings in *Arizona* v. *California* in 1953. 344 U.S. 919. The United States did not thereby waive its sovereign immunity to being named as a defendant in any suit in the district court to resolve disputed questions of title. Insofar as the instant case is concerned, that immunity from the district court's jurisdiction was preserved by Congress when it enacted the QTA in 1972, by virtue of the "Indian lands" and "water rights" exceptions in the QTA and the limitation on the granting of relief only to parties who themselves claim an interest in the disputed property. There is no suggestion in the QTA or elsewhere—such as in the statutes regulating this Court's original jurisdiction or authorizing the Attorney General and Solicitor General to conduct litigation on behalf of the United States in this Court (28 U.S.C. 518(a), 1251)—that Congress authorized officials of the Executive Branch to waive that statutorily prescribed immunity by participating in an original action in this Court.[34] See *Minnesota* v.

[33] The claimant also could petition Congress to enact a private bill granting relief or sue the United States for a money judgment on the theory that the United States had taken his interest in the property and therefore was obligated to pay just compensation. See *Block*, 461 U.S. at 280-281.

[34] Nor, of course, was the intervention and subsequent participation in *Arizona* v. *California* intended to have that consequence.

United States, 305 U.S. 382, 388-389 (1939) ("Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States."); see also *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 513-515. The absence of any indication of an affirmative congressional authorization is fatal, because, as the court of appeals recognized, waivers of sovereign immunity must be "unequivocally expressed" and must be "construed strictly and narrowly" (Pet. App. 7a). See *Block*, 461 U.S. at 287.[35]

This conclusion is reinforced by the differences in the nature of the two suits at issue here. Although the measure of the water

[35] For the same reasons, the statement by Deputy Solicitor General Claiborne during the oral argument before this Court in *Arizona* v. *California II*, quoted by petitioners (Br. 11, 1a), likewise could not operate as a waiver of the United States' sovereign immunity to this suit in the district court—even if we assume that the statement was intended and understood as a formal waiver of the arguments the United States had made in its motion to dismiss in the instant suit. In any event, the single statement upon which petitioners rely does not bear the weight they seek to give it.

The transcript of the oral argument indicates (at page 62) that in response to a question from the Bench regarding the pending motion to dismiss in the instant case, Mr. Claiborne stated: "I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court." At most, the statement reflected Mr. Claiborne's view at that time regarding the merits of the various arguments raised in the motion to dismiss; he did not suggest that the United States was formally abandoning those arguments, of which the sovereign immunity defense was only one. To the contrary, the very next sentence of his statement indicated that the district court would have to resolve those issues. See Tr. 62 ("Whether that—all of those defenses or some of them will prevail in that court is something—"). It also is possible that Mr. Claiborne misspoke, or that the third "I" in the first of Mr. Claiborne's statements quoted above was mistranscribed, since the sentence would make better grammatical sense without it and would have the opposite meaning. In any event, the Court apparently did not take the single ambiguous statement in Mr. Claiborne's colloquy with the Court as a formal concession that the district court could review the boundary issue under the APA, because the Court made no mention of the point in its opinion. The Court instead contemplated that the sovereign immunity question and other threshold issues would be resolved on the merits in the course of proceedings in the district court and court of appeals (460 U.S. at 638), as they now have been.

right reserved by the United States on behalf of the Tribe is determined in *Arizona* v. *California* by the number of practicably irrigable acres within the Reservation, the district court litigation initiated by the water-agency petitioners goes beyond establishing a basis for the quantification of water rights. In this suit, petitioners challenge the Secretary's statutory authority under 43 U.S.C. 772 to correct the boundary of the Fort Mojave Indian Reservation—and, as a consequence, to adjust the boundary between lands held in trust for the benefit of an Indian Tribe and other federal lands—as well as the procedures utilized by the Secretary for that purpose. The court of appeals therefore properly characterized this lawsuit as a challenge to "the Secretary's authority and procedures [to] establish[] Indian reservation boundaries" (Pet. App. 8a), and thereby to ascertain the trust status of land owned by the United States. Unlike *Arizona* v. *California*, it is not limited to the determination of *water* rights. And of course the district court could not enter a judgment that actually quantified the United States' reserved rights for the 3500-acre area; that is a subject governed by the decree in *Arizona* v. *California*.

Nor are they any compelling circumstances that would warrant recognition in this case of the novel waiver rule petitioners advocate. As we have explained above (see pages 15-17, *supra*), the Secretary's boundary determination cannot result in increased water rights for the Reservation unless the decree in *Arizona* v. *California* is amended, and the Court made clear in *Arizona* v. *California II* that petitioners must be afforded an opportunity to contest that determination before the decree will be amended. If the judgment of the court of appeals is affirmed, the United States will promptly consider what further steps it should take to bring about an expeditious and final resolution of the boundary issue.[36]

[36] One possibility would be for the parties to file a joint motion in *Arizona* v. *California* requesting the Court to resolve the boundary issue as part of a final resolution of the United States' claim of water rights for the Fort Mojave and other Reservations. Indeed, petitioners presumably could file such a motion on their own behalf, since the United States has already submitted its

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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water-right claims for the Fort Mojave Reservation to this Court for resolution in *Arizona* v. *California* and sovereign immunity therefore would not bar the Court from proceeding to a resolution of those claims for the 3500 acres at issue here on the motion of another party to that case.

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. The Administrative Procedure Act provides in relevant part (5 U.S.C. 702)):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the courts to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. The Quiet Title Act, 28 U.S.C. (& Supp. IV) 2409a, provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may

be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the

date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(*l*) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefore, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

3. The McCarran Amendment, Section 208 of the Act of July 10, 1952, ch. 651, 66 Stat. 560, as codified at 43 U.S.C. 666, provides:

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or

that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Services of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(b) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

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